IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUELINE FRANKLIN, ASHLEIGH PARK, LILLY SHEPARD, STACIE ALLEN, MICHAELA DEVINE, KARINA STRELKOVA and DANIELLE LAMAR, individually, and on behalf of a class of similarly situated individuals,

Appellants,

vs.

RUSSELL ROAD FOOD AND BEVERAGE, LLC,

Respondent.

Case No. 74332

District Court Case No. A-14-709372-C

Appeal from the Eighth Judicial District Court, Clark County, Nevada

APPELLANTS' REPLY BRIEF

P. Andrew Sterling (NV Bar No. 13769)
Michael J. Rusing (AZ Bar No. 6617 – *Admitted Pro Hac Vice)*
RUSING LOPEZ & LIZARDI, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800
Email: asterling@rllaz.com
mrusing@rllaz.com

Ryan M. Anderson (NV Bar No. 11040)
Kimball Jones (NV Bar No. 12982)
MORRIS ANDERSON
716 S. Jones Blvd.
Las Vegas, NV 89107
Telephone: (702) 333-1111
Email: ryan@morrisandresonlaw.com
kimball@bighornlaw.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

This Reply Brief responds to certain arguments presented in the Answering Brief of Respondent Russell Road Food and Beverage LLC ("the Club" or "Crazy Horse III") at Section III.A-J. Any issues not addressed herein are adequately supported in Appellants' Opening Brief.

A. The Court should decline the Club's invitation to interpret NRS 608.0155 to apply to constitutional wage claims because it cannot be reconciled with the statute's plain language

The first six words of NRS 608.0155 state its independent-contractor test applies only "[f]or the purposes of this chapter" (*i.e.*, for purposes of the Nevada Wage and Hour Law ("NWHL"), NRS Chapter 608). This limiting language is quite clear. If the Legislature intended NRS 608.0155 also to apply "for the purposes of any other chapter or constitutional provision" they easily could have said so. And, indeed, the Legislature used this broader language elsewhere in the NWHL. NRS 608.255, for example, applies "[f]or the purposes of this chapter *and any other statutory or constitutional provision governing the minimum wage paid to an employee…"* (emphasis added). NRS 608.1055 by its plain language thus only applies to NWHL claims and, since this is not an NWHL claim, that should be the end of the matter.

In an attempt to argue NRS 608.0155 does not mean what it says, the Club points out that Section 7 of Senate Bill 224 (which was not codified in the Nevada Revised Statutes) provides that "[t]he amendatory provisions of this act apply" to

all actions brought under the Minimum Wage Amendment (MWA) or the NWHL "in which a final decision has not been rendered." Ans. Brief at 6. The Club suggests that, despite NRS 608.0155's clear limiting language, this Court should discern in Section 7 a legislative intent that NRS 608.0155 should apply to MWA claims. *Id*. But the canon of harmonious interpretation provides that, "[w]henever possible, we will interpret a statute in harmony with other rules and statutes." *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 827, 192 P.3d 730, 734 (2008). And the related general/specific cannon provides that "the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict, but can exist in harmony." *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1265 (Nev. 2017) (citations and quotations omitted). *See also Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls.").

Here, Section 7's general provisions regarding the intended retroactive effect of SB224 should not be read to conflict with the specific limiting language in NRS 608.0155(1) and, even if a conflict existed between the two provisions, the specific limiting language in NRS 608.0155(1) would control. The better interpretation – the one that harmonizes the two provisions – recognizes that Section 7 merely

provides a general statement that the amendatory provisions of SB224 are to have retroactive effect in all pending litigation *in which they apply* (subject, of course, to due process limitations). There are two amendatory provisions in SB224: NRS 608.0155 (the independent contractor test) and NRS 608.255(3) (a somewhat self-evident general declaration that "[t]he relationship between principal and an independent contractor" is not an employment relationship). The former provision states it applies only to NWHL claims ("[f]or purposes of this statute"); the latter provision states it applies both to NWHL and MWA claims ("[f]or the purposes of this chapter and any other statutory or constitutional provision governing the minimum wage paid to an employee…"). Thus Section 7, fairly read, merely expresses the intent that NRS 608.0155 should apply to all pending NWHL claims and that NRS 608.255(3) should apply to all pending NWHL and MWA claims.

B. The Club's attempt to argue around the principle of constitutional supremacy is confusing and fundamentally flawed

The Club in Section B of its Answering Brief presents a series of loosely-connected thoughts on why NRS 608.0155, if applied to limit MWA claims, would not violate the principle of constitutional supremacy. The Dancers respond to each thought as follows:

- *"The Dancers' argument relies largely on their unfounded assumption that they would be, or somehow are, 'automatically employees' pursuant to the definition of one under the MWA."* Ans. Brief at 7.

This is not true. The Dancers simply are saying that, if they are the Club's employees within the MWA's definition of that term (and without question they are), then no statute can strip them of their constitutionally-protected rights. *See Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (2014) ("[T]he principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.").

- *"NRS 608.0155 only provides a test by which to conclude presumptively whether a person is or is not an independent contractor, not an employee. No definition of an independent contractor exists in the MWA, or within NRS Chapter 608, prior to the institution of NRS 608.0155. ... [NRS 608.0155 is] "capable of coexistence [with the MWA] so long as the statute is understood, as it may reasonably be, to supplement gaps in the MWA's terms."* Ans. Brief at 7-8 (emphasis in original) (quoting *Perry v. Terrible Herbst*, 132 Nev. Adv. Op. 75 at *7, 383 P.3d 257, 259-61 (2016)).

The Club here appears to be attempting to argue around *Thomas* (and the bedrock principle of constitutional supremacy) by noting the MWA does not define "independent contractor" and suggesting the Legislature therefore is free to "fill in the gaps" by defining who is an "independent contractor" (and thus not an employee under the MWA). But this Court in *Thomas* did not suggest the Legislature could do an easy end-run around its ruling (and around the principle of constitutional supremacy) simply by re-casting a legislative exception ("taxicab drivers" are not employees) as a threshold exclusionary test ("any person who transports passengers in a vehicle for a fee" is not an employee). The principle of

constitutional supremacy cannot be so easily subverted. Rather, as this Court emphatically held, the principle of constitutional supremacy requires that "all employees not exempted by the Amendment, including taxicab drivers [and exotic dancers], must be paid the minimum wage set out in the Amendment." *Thomas* at 522. The only relevant question (which the Club entirely fails to address) is whether the Dancers are employees under the MWA.[1] If they are, then no statute can strip them of their constitutionally-protected rights, whether by specific exemption or by a threshold test that would accomplish the same result.

The specious nature of the Club's "gap-filling" theory of constitutional interpretation is readily apparent when applied to more familiar provisions of the federal constitution. According to the Club, Congress could not pass a law directly excepting flag burning from the protections afforded by the First Amendment because, like the taxi-driver exception in *Thomas*, this would be an exception that "directly contradicted" the First Amendment's free speech clause. But, the Club would suggest, because the First Amendment does not define "conduct," Congress could enact a "gap-filling" law establishing a "conclusive presumption" that flag burning constitutes "conduct" and that statutorily-defined "conduct" is not

[1] As explained in the Dancers' Opening Brief, the MWA's definition of "employee" is identical to the FLSA definition and incorporates the FLSA's well-known economic realities test. *See* Op. Brief at 21-25 (interpreting MWA's definition of "employee" according to well-established framework set forth in *Miller v. Burk*, 124 Nev. 579, 188 P.3d 1112 (2008)). The Club entirely ignores *Miller's* interpretive framework and does not even attempt to identify any plausible alternative definition of the term.

"speech" protected by the First Amendment. Plainly, that is not how the principle of constitutional supremacy works. It is "emphatically the province and duty of the judicial branch" to define constitutional terms, including what constitutes protected "speech" or who is a protected "employee." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Thomas* at 522. "If the Legislature could change the Constitution by ordinary enactment, 'no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.'" *Id.* (*quoting City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (alteration in original) (*quoting Marbury v. Madison*, 5 U.S. 137 (1803)).

The Club's citation (without analysis) to *Perry v. Terrible Herbst* in support of its novel "gap-filling" theory is extremely misleading. *See* Ans. Brief at 8. This Court in *Perry* merely determined what statute of limitations should apply to a constitutional cause of action when none is specified. *Perry*, 383 P.3d at 262 ("When a right of action does not have an express limitations period, we apply the most closely analogous limitations period."). The plaintiff in *Perry* tried to argue that "the MWA's detailed framework and silence as to any statute of limitations effect an implied repeal" of the two-year statute of limitations in NRS 608.260, thus "making it appropriate to apply the catch-all four-year limitations period in NRS 11.220." *Perry* at 260. The Court correctly rejected this argument because

> [a] constitutional amendment impliedly repeals a statute [only] 'where the two are irreconcilably repugnant, such that both cannot stand.' *Thomas v. Nev. Yellow Cab Corp*., 130 Nev., Adv. Op. 52, 327 P.3d 518, 521 (2014). But unlike the taxicab drivers in *Thomas*—to whom the [substantive provisions of the] MWA applied where NRS 608.250(2)(e) excepted them categorically—no direct conflict exists between the MWA's silence as to the appropriate statute of limitations to apply and the two-year statute of limitations provided in NRS 608.260. On the contrary, "we have two ... provisions that are capable of coexistence" so long as the statute is understood, as it may reasonably be, to supplement gaps in the MWA's terms.

Perry at 260–61. *Perry* thus stands for the modest proposition that, where a constitutional cause of action is silent as to the appropriate statute of limitations, a statute can supplement that gap consistent with the well-established rule that, when a right of action does not have an express limitations period, courts apply the most closely analogous limitations period. Importantly, a statute of limitations is a permissible "gap filler" for a constitutional cause of action because, unlike the statutory carve-out struck down in *Thomas* (and the threshold exclusionary test at issue here), it does not modify or abridge the substantive scope of the constitutional provision.

But *Perry* in no way holds or suggests that a statute can change a constitutional legal standard or abridge the substantive scope of a constitutional definition by defining a set of things that are to be excluded from that definition. That situation was addressed in *Thomas*, where the Court held the Legislature

could not change the scope of the MWA by carving out an exception to the MWA's definition of employee. In *Thomas*, the exception was specific – taxi cab drivers. Here, the exception is broader – any individual who satisfies the statute's independent contractor test. But both statutes, if enforced, would accomplish the same impermissible result – *i.e.*, removing individuals from the substantive scope of the MWA.

- *This Court in Terry "already has found that the MWA definition of 'employee' was vague' ... [and] that the courts were obligated to look within Nevada statutes to determine definitions for both an employee and an independent contractor." Ans. Brief at 8-9.*

Here the Club makes two points: one true, one false. Yes, the MWA's definition is vague. So is the identical definition in the FLSA. But *Terry* does not stand for the proposition that courts should look to statutes to define vague constitutional terms, especially ones that are enacted by voter initiative and not by the Legislature. In fact, there was no constitutional question before this Court in *Terry* at all, as the plaintiff in that case brought a claim solely under the NWHL, and not the MWA. *Terry*, 336 P.3d at 951. The Court in *Terry* interpreted the NWHL's definition of "employee" by looking at the similar definition in the FLSA and considering relevant prudential concerns. *See, e.g., id*. at 957 (noting "burden on businesses and potential confusion should Nevada's Minimum Wage Act and the FLSA fail to operate harmoniously"). But *Terry* has nothing to say about how courts go about interpreting constitutional terms added by voter initiative. As set

forth in the Dancers' Opening Brief, this Court interprets such terms (even those that are vague or difficult to define) by looking first at the text of the provision. *Miller v. Burk*, 124 Nev. 579, 590–91, 188 P.3d 1112, 1119–20 (2008). If the text is ambiguous, courts then will consult "history, public policy, and reason to determine what the voters intended." *Id.* A statute enacted many years after voters added the MWA to the Nevada Constitution is entirely irrelevant for purposes of determining what voters intended the amendment to mean.

C. The Club musters virtually no response on the dispositive issue of preemption

The Club devotes only two paragraphs to the issue of federal preemption, neither of which amount to much. *See* Ans. Brief at 9-10.

In the first paragraph, the Club attempts to invoke the waiver doctrine to avoid the issue entirely. But it is well established that the rule of waiver is discretionary and does not preclude appellate review of purely legal issues. *See, e.g.*, *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999) (considering interpretation of statute not raised below); *see also United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988) (addressing "issue for the first time on appeal because it involves a purely legal issue and the interpretation of a new statute."). Here, this Court's consideration of a purely legal question of first impression – whether NRS 608.0155 is preempted by federal law – is

especially warranted because it is "both central to the case and important to the public.'" *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984).

In the second paragraph, the Club conclusorily alleges that "[t]his Court already has determined that the FLSA does not preempt NRS Chapter 608 and does not conflict with the FLSA." Ans. Brief at 10 (citing, without analysis, to *Dancer v. Golden Coin, Ltd.*, 124 Nev. 28, 32, 176 P.3d 271, 274 (2008)). The Club's citation to *Golden Coin* does not hold up under the most basic scrutiny.

The issue in *Golden Coin* was whether a trial court erred in holding NWHL claims were preempted by the FLSA merely "because the NWHL applied to the same subject." *Golden Coin*, 124 Nev. at 32, 176 P.3d at 274. This Court reversed the trial court because "the FLSA expressly provides that higher state minimum wage legislation may control minimum wage claims, and because Nevada's minimum wage law provides greater employee wage protection than that provided under the FLSA." *Id.* at 30, 176 P.3d at 273.

Here, in contrast, the issue is whether the FLSA preempts a new amendment to the NWHL, enacted after the *Golden Coin* case was decided, that would have the effect of providing lesser employee wage protections than that provided under the FLSA because the state law would use a narrower definition of "employee" than the broad FLSA definition. And, though no other state appears to have attempted to enact a minimum wage law that would protect less people than the

FLSA, other courts have held the FLSA will preempt state wage laws "where the state law is less beneficial to employees, and, thus, the federal statute establishes a national floor under which wage protections cannot drop, but more generous state employee protections are not precluded." *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 607 Pa. 527, 551, 8 A.3d 866, 880 (2010); *see also Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 956 (2014) (noting that, "to avoid preemption, our state's minimum wage laws may only be equal to or more protective than the FLSA.").

The Club does not even attempt to respond to the obvious conflict identified in the Dancers' Opening Brief that would arise if the NWHL used a narrower definition of "employee" than the one used by its federal counterpart – namely, that it would be impossible for Nevada employers to categorize and pay their workers as employees under the FLSA and also as non-employees under the NWHL. *See Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp*., 123 Nev. 362, 375, 168 P.3d 73, 82 (2007) (holding state laws are preempted and without effect if "a party's compliance with both state and federal laws is impossible…").

The potential conflict is very similar to the conflict that arose in 1975 with regard to Title VII and the NWHL. At that time, the Nevada legislature proactively responded to Title VII conflict preemption concerns raised in a 1973 lawsuit filed by the federal government against Nevada by amending the NWHL to make it

align with Title VII. *See* Hearing on A.B. 219 Before Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 18, 1975) (testimony by Deputy Attorney General Menchetti) (noting existing state statute conflicted with Title VII and needed to be amended because it required different terms and conditions of employment for females than for males); *see also* Fact Sheet on AB 219 (issued by Assemblymen Ford and Banner and attached to 2/18/75 hearing minutes) (noting with concern fact that, "[i]n spite of the passage of [Title VII] and other similar acts, there has remained in Nevada law a set of conflicting statutes contained in Chapter 609 regarding wages, hours, and working conditions of female employees.") (emphasis in original). The obvious conflict prompting the Legislature to take action in 1975 was that it would be impossible for Nevada employers to treat female and male employees the same under Title VII and also treat them differently under the NWHL. Here, similarly, it would be impossible for Nevada employers to treat workers as employees under the FLSA and also treat them as independent contractors under the NWHL.

The conflict preemption analysis here also is directly analogous to cases assessing competing state and federal laws regulating the labeling of pharmaceutical products. A state law requiring a drug manufacturer to label a product one way is preempted by a federal law requiring the product to be labeled another way because it is impossible for manufacturers to comply with both

standards. *See Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) ("[I]t was impossible for Mutual to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label. Accordingly, the state law is pre-empted."); *see also PLIVA, Inc. v. Mensing,* 564 U.S. 604, 618 (2011) (holding state law preempted where "impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same."). As the U.S. Supreme Court in these cases held, drug manufacturers cannot comply with different state and federal laws regarding how to label their products, and so the conflicting state law is preempted. Similarly, employers cannot comply with different state and federal laws regarding how to classify (label) their workers for purposes of minimum wage laws, and so the conflicting state law is preempted.

D. Even if the NRS 608.0155 test applied to limit MWA claims, it would not be met as a matter of law

A presumption of independent-contractor status under NRS 608.0155 only arises if the worker is "required by the contract with the principal to hold any necessary state business license or local business license and to maintain any necessary occupational license, insurance or bonding." NRS 608.0155(1)(b). And, even if this threshold requirement is met, three of five additional "sub-factors" also must be met. *See id.* at (1)(c)(1)-(5). The trial court clearly erred in summarily

determining every element of this test was met. Upon *de novo* review, and considering all the evidence "in a light most favorable to the nonmoving party," *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005), it is clear that the contract at issue does not contain the language required by NRS 608.0155(1)(b) and, additionally, that only one sub-factor would be met as a matter of law – sub-factor (1)(c)(3) (worker "not required to work exclusively for one principal").

1. The fact that dancers entered into a contract with the Club is irrelevant

The Dancers in their Opening Brief noted that, even if it applied to limit MWA claims, NRS 608.0155 does not purport to apply where, as here, there is no contract between the parties for one to perform work for the other. *See* Op. Brief at 38-40. This is because most of the criteria in the test "either assume the existence of a contract between the two parties to perform work or, more critically, cannot meaningfully be applied unless there is such a contract." *Id.* at 39. The plain language of NRS 608.0155 thus indicates it was meant to determine whether workers who are hired to perform work should be classified and paid as employees or as independent contractors. The test could be applied, for example, if a package-delivery company classified and paid its delivery drivers as independent contractors and the drivers claimed they were in fact employees, as was the case in

Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014). Here, the test cannot coherently be applied because there is no contract to perform work – the Club has never classified or paid its dancers as independent contractors or as employees. Rather, the Club at all relevant times has classified its dancers as licensees who pay it for the privilege of "renting" its facilities. Thus, the only classification question is whether the Club's dancers are employees as a matter of economic reality, as the Dancers contend, or licensees as a matter of contract, as the Club contends. NRS 608.0155 has nothing to say about the propriety of this alleged licensor-licensee relationship.

The Club in its Answering Brief entirely ignores the Dancers' point that NRS 608.0155 by its plain language applies only where there is a contract between two parties to perform work and instead sets up and knocks down a straw man. *See* Ans. Brief at 11-12 (erroneously claiming Dancers' suggested NRS 608.0155 "does not apply because no contract existed" and then refuting that non-issue).

2. The Club's "Entertainer Agreement" does not require its dancers to "hold any necessary state business registration or local business license and to maintain any necessary occupational license, insurance or bonding"

An individual hired to perform work is presumptively classified as an independent contractor under NRS 608.0155 only if she is "required by the contract with the principal to hold any necessary state business registration or local

business license and to maintain any necessary occupational license, insurance or bonding." NRS 608.0155(1)(b). This bright-line requirement provides clear guidance going forward as to what language must be included in contracts in order to qualify under its provisions. But no such language appears in the Club's "Entertainer Agreement" (which is not surprising, as the contract was drafted before this statutory requirement existed). The only potentially-relevant provision of the "Entertainer Agreement" cited by the Club is a sentence fragment in paragraph 5 ("Duty of Legal Performances"), which provides that the dancer "agrees to comply in all respects with the applicable laws, rules, and regulations of the United States, the State of Nevada, and the County of Clark …" Ans. Brief at 13 (quoting APP 676 and 818, Vol. 4).

But this paragraph pertains, as the section heading indicates, to the dancers' "duty" to provide "legal performances" (*i.e.*, to not engage in illegal solicitation and/or prostitution).[2] Reading the full paragraph, rather than just the snippet highlighted by the Club, confirms its limited focus:

> 5. DUTY OF LEGAL PERFORMANCES. Entertainer agrees not to misrepresent any services of The Crazy Horse III; nor to knowingly make any false or misleading statement to anyone. Entertainer acknowledges that said entertainer is aware that "Solicitation or the Act of Solicitation" is a crime. That any form of solicitation or

[2] Contract section headings are permissible indicators of meaning. Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 221 (2012); *see also Torres v. Farmers Ins. Exchange*, 106 Nev. 340, 347-48, 793 P.2d 839, 844 (1990) (heading taken into account in determining meaning of paragraph).

> prostitution either initiated by the Entertainer, the customer, or any person whosoever constitutes a crime. That these actions violate the laws of the United States, the State of Nevada, the County of Clark, and it's [sic] Nevada Revised Statutes, County Ordinances, Administrative Codes, and Municipal codes. Entertainer acknowledges that any violation of the aforementioned WITHOUT ANY EXCEPTION WHATSOEVER will result in said Entertainer being prohibited from the use of the facilities of The Crazy Horse III. Entertainer agrees to comply in all respects with the applicable laws, rules and regulations of the United States, the State of Nevada, the County of Clark in order to protect the name, liability and good public reputation of The Crazy Horse III.

APP 676 and 818, Vol. IV.

The plain language of Paragraph 5 confirms its purpose, as the paragraph heading indicates, is to require Dancers to "protect the [Club's] name, liability and good public reputation" by not engaging in illegal solicitation and/or prostitution. Thus, the "applicable" laws, rules, and regulations with which dancers must comply under this paragraph are those relating to solicitation and prostitution (the topic of the paragraph). Paragraph 5 cannot reasonably be interpreted to require dancers to obtain business licenses or to maintain any kind of insurance or to do anything else unrelated to their duty to not engage in solicitation or prostitution. And, even if this paragraph were ambiguous on this point, "it is a well settled rule that '[i]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the

selection of its language.'" *Williams v. Waldman*, 108 Nev. 466, 473, 836 P.2d 614, 619 (1992) (*quoting Jacobson v. Sassower,* 66 N.Y.2d 991 (1985)).

The trial court thus clearly erred in adopting the Club's overly-broad interpretation of Paragraph 5 as a matter of law. This Court (if it reaches this issue) should hold the plain language of the agreement either (a) does not require dancers to "hold any necessary state business registration or local business license and to maintain any necessary occupational license, insurance or bonding"; or (b) is at least ambiguous on this point and therefore must be construed against its drafter (the Club). *Williams v. Waldman*, 108 Nev. 466, 473, 836 P.2d 614, 619 (1992). In either case the result is the same - the NRS 608.0155 test is not met as a matter of law.

3. The trial court erred in concluding the sub-factors in NRS 608.0155(1)(c) all were met as a matter of law

a. Disputed fact issues preclude summary judgment on the issue of control

At the summary judgment stage all "pleadings and other proof must be construed in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). Here, numerous facts in the record indicate the Club, and not the dancers, controlled all significant aspects of the dancers' conduct and behavior. *See* Op. Brief at 5-7 and 28-32 (identifying specific evidence in the record, including detailed rules of behavior and pricing

sheets issued by the Club, indicating the Club controlled the Dancers' appearance, conduct, use of space in the club, and interactions with club patrons). The trial court plainly erred in ignoring this evidence and concluding the "control sub-factor" in NRS 608.0144(1)(c)(1) was met as a matter of law. *See* APP 2518, vol. XII (concluding, despite evidence in record to contrary, that "it is an undisputed material fact that Plaintiff Franklin had complete control and discretion over the means and manner of the performance of her work.").

b. Sub-factor (1)(c)(2) does not apply because the Entertainer Agreement is a contract for entertainment

The Club does not dispute NRS 608.0155(1)(c)(2) (which considers the worker's "control over the time the work is performed") does not apply "if the work contracted for is entertainment" but merely argues "[t]he Dancers do not provide any evidence that Franklin's contract is such an entertainment contract…" Ans. Brief at 17. But, of course, the "evidence" is the plain language of the contract at issue, which just happens to be called an "Entertainers Agreement." APP 1003-05, vol. V. *See also id.* at 1003 (stating purpose of Entertainer Agreement is for dancers to provide "entertainment for persons who are present at The Crazy Horse III facility."); *id*. at 1004 (stating "ability and quality of the act(s) performed by Entertainer is essential to the economic success of The Crazy Horse III").

The Club's suggestion that the purpose of the Entertainer Agreement is not to provide entertainment is about as plausible as the notion that exotic dancers are not an integral part of a strip club's business. *See Terry* at 960 (noting "self-evident conclusion that nude dancers formed an integral part of [the strip club's] business").

c. Accepting the Club's interpretation of sub-factor (1)(c)(4) would mean it would almost always be met

The trial court accepted the Club's argument that the requirement in NRS 608.0155(1)(c)(4) that a "person is free to hire employees to assist with the work" is met if the worker could pay people to help her prepare to do the work, even if she did not do so. *See* APP 2520, vol. XII (concluding sub-factor met because dancers could "hire employees … such as a hair stylist, dancing instructor, makeup artist, etc. although she did not do so…"). The problem with this unrestricted interpretation is that it would mean this sub-factor would be met by virtually every single worker in Nevada, including fast food workers, teachers, and store clerks, all of whom could "hire" hair stylists, makeup artists, or anyone else to help them look good or otherwise prepare for their job. Presumably the Legislature did not intend this sub-factor almost always would be met. *See Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) ("An ambiguous statutory provision should also be interpreted in accordance "with what reason and

public policy would indicate the legislature intended.") (*quoting McKay v. Bd. of Supervisors*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986)).

As a matter of first impression, a more reasonable interpretation of this sub-factor that furthers the public policy of correctly identifying economically-independent contractors would require a showing that the worker could hire employees to actually "assist with the work" they were hired to perform. Here, "the work" is exotic dancing. This sub-factor thus would be met if dancers could hire a DJ to play music, security guards to protect them, a cashier to process payments, or any other employee to actually "assist with the work" of exotic dancing in the club. Under this reasonable interpretation this sub-factor is not met because the Club, and not the dancers, hired and controlled all these other employees.

E. The Club punts on the MWA's definition of "employee"

The Dancers in their Opening Brief noted the Club in the proceeding below conceded that, if NRS 608.0155 does not apply or is not met, "it logically follows that the Nevada Supreme Court's usage of the 'economic realities' test may perhaps then be appropriate" to determine the MWA's scope. Op. Brief at 21 (*quoting* APP 1312, vol. VI). Now, before this Court, the Club for the first time insists the MWA's definition of employee does not incorporate the economic realities test but, remarkably, offers no alternative suggestion as to what that constitutional term might mean. *See generally* Ans. Brief at Sec. III.F. As analyzed

at length in Appellants' Opening Brief, the only reasonable interpretation of the MWA's definition of employee is that it is co-extensive with the identical FLSA definition. *See* Op. Brief at 21-25. The Club has suggested no plausible alternative definition and therefore impliedly concedes the point.

F. The Club's attempt to argue around the economic reality of dependence that permeates the Club-Dancer relationship is not well taken

As this Court previously observed, the notion that exotic dancers may be classified as independent contractors (or licensees) is "a tenuous proposition given that most foreign precedent demonstrates it is performed by employees." *Terry at* 960. The Club in Section III.G of its Answering Brief nevertheless gamely attempts to suggest its strip club is somehow different from every other strip club and that the economic reality of the relationship it has with its dancers is not one of economic dependence. But this merely re-hashes the "creative argument" soundly rejected by this Court in *Terry* (and by the foreign precedent cited with approval therein) that dancers merely "rent stages, lights, dressing rooms, and music from [the club]" in order to pursue their independent (but unlicensed) "business" of exotic dancing. *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir.1993) (cited with approval in *Terry*). The undisputed facts suggest otherwise. *See generally* Op. Brief at Section A ("Undisputed Facts Regarding Application of Economic Realities Test"). *See also Terry at 960* (noting its conclusion that exotic

dancers are employees as matter of law is "in accord with the great weight of authority, which has almost 'without exception ... found an employment relationship and required ... nightclub[s] to pay [their] dancers a minimum wage.'") (*quoting Clincy v. Galardi S. Enters., Inc.*, 808 F.Supp.2d 1326, 1343 (N.D.Ga.2011)).

The Club also attempts to sidestep the compelling point that exotic dancers necessarily are economically dependent on the clubs in which they work because it is not lawful for them to operate as "independent businesses" under the Las Vegas Municipal Code by noting the Club is located just outside city limits in an unincorporated portion of Clark County. *See* Ans. Brief at 27. But surely the Club knows the Clark County code is identical, in all material respects, to the City's code. *Compare* Las Vegas Municipal Code Ch. 6.06B (authorizing business license for "erotic dance establishments" but not individual dancers) with Clark County Code Ch. 6.160 (same). Both the city and county codes confirm the emphatic determinations, by this Court and by dozens of courts across the country, that exotic dancers are not (and cannot lawfully be) in business for themselves; rather, they are dependent for employment on the clubs in which they work. The clubs hold the necessary erotic dance establishment business licenses, hire the dancers, provide the venue and 100% of the substantial capital investment required to

maintain and market the enterprise, supervise and control the dancers' performances, and can fire dancers at any time and for any reason.

G. The Club does not explain how the trial court's class certification order applied the correct legal standard

The Dancers in their Opening Brief argue the trial court "applied the wrong legal standard and therefore abused its discretion in denying class certification based solely on a finding that the "'deposition testimony of some of the actual specific lead, currently named Plaintiffs, the representatives of the potential class do not establish that they are already in the category in which they are seeking to represent.'" Op. Brief at 50 (*citing* Class Certification Order, APP 274, vol. II). Curiously, the Club claims "the Dancers' Brief does not identify exactly which standard was wrongly applied." Ans. Brief at 28. As the Opening Brief clearly states, the correct legal standard (that the trial court completely ignored) is set forth in NRCP 23(a) and 23(b)(3). *See* Op. Brief at 47 (identifying correct legal standard).

The Club does not dispute that the trial court in its class certification order did not mention any part of Rule 23 or cite any relevant case law. Nor does the Club explain how the only evidence relied upon by the trial court – deposition testimony by two dancers about how they handled tax returns – is relevant to any part of Rule 23's legal standard. And, in fact, it is not relevant. *See* Op. Brief at 47.

The trial court therefore "necessarily abuse[d] its discretion" because "it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (quoted with approval in *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)). At the very least, therefore, the trial court's order denying class certification must vacated so that, on remand, the trial court can apply the correct legal standard set forth in NRCP 23(a) and 23(b)(3). However, for the reasons set forth in the Opening Brief, the record clearly establishes that class certification is warranted, and the trial court therefore should be directed on remand to enter an order granting class certification. *See generally* Op. Brief at Sec. E.

H. The Club fails to appreciate why Ms. Strelkova's claims should be combined under *Castillo* to meet the jurisdictional threshold

The Club's suggestion that Ms. Strelkova cannot combine her wage claim and unjust enrichment claim to meet the amount in controversy misapprehends the nature of her claim for damages. Ans. Brief at 43. Her claim for damages (under any legal theory) has two components: (1) payment of the prevailing minimum wage for each hour worked (which the Club calculated at $7,515.75); and (2) re-payment of all fees improperly extracted from her by her employer (approximately $5,000). It is possible the repayment of fees could be included as part of the recovery under the wage claim (on the view that the fees constitute "negative

wages") or it could be awarded separately under the unjust enrichment claim. But, regardless of how the damages are apportioned among the claims, Ms. Strelkova's "make-whole" damages claim without question includes both wages owed and fees paid and, therefore, should have been combined when considering the jurisdictional amount-in-controversy. *Castillo v. United Fed. Credit Union*, 409 P.3d 54, 58 (Nev. 2018).

I. The Club's strict amount-in-controversy rule in class actions would result in inefficient and unnecessary parallel litigation

The Court should clarify its ruling in *Castillo* to confirm that attorneys initiating class actions under NRCP 23 do not need to file parallel actions in both District Court and Justice Court to handle class member claims above and below the jurisdictional threshold. As long as one class representative satisfies the jurisdictional amount, the class action belongs in District Court. This Court's ruling in *Castillo* was based on prudential concerns in a case where no class representative met the jurisdictional amount: "because class action members with small claims still have a forum to litigate, we distinguish our state from other jurisdictions and decline to aggregate individual class member claims to determine the amount necessary for the district court to establish subject matter jurisdiction." *Castillo*, 409 P.3d at 58. But where, as here, at least one class representative meets the jurisdictional minimum, prudential concerns of judicial efficiency strongly suggest the District Court can exercise supplemental jurisdiction over the other

claims, or that the claims should be aggregated to allow the action to proceed in one venue.

CONCLUSION

Crazy Horse III, like other strip clubs, steadfastly refuses to classify its dancers as employees and, instead of paying them wages and providing other employee benefits, makes them pay to work and puts the risk of not generating enough tips to cover the house fee on the dancers. It is a lucrative policy, but it is flatly prohibited by the Nevada Constitution's Minimum Wage Amendment and by the parallel federal wage law. This Court therefore should reverse the trial court's grant of summary judgment in favor of the Club and its denial of class certification and confirm, based on a review of the totality of the circumstances of the working relationship's economic reality, that the Club's dancers qualify as employees under the MWA's broad definition of that term.

Date: December 20, 2018

RUSING LOPEZ & LIZARDI, PLLC
/s/ P. Andrew Sterling
Andrew Sterling

Date: December 20, 2018

MORRIS ANDERSON
#12982
For
Ryan Anderson

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

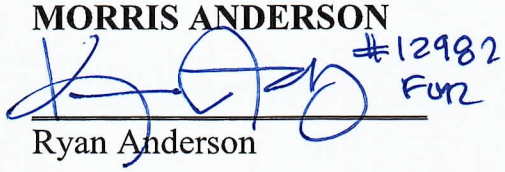
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface us Times New Romans in 14-size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(B), it is proportionately spaced, has a typeface of 14 points or more and contains 6,678 words.

3. I further hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous, or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Date: December 20, 2018

MORRIS ANDERSON



Ryan Anderson

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of MORRIS ANDERSON and that I served the foregoing APPELLANT'S REPLY BRIEF on the parties listed below by causing a full, true, and correct copy to be served in the matter identified

Gregory J. Kamer, Esq.
Kaitlin H. Ziegler, Esq.
KAMER ZUCKER ABBOTT
3000 W. Charleston Blvd., Ste. 3
Las Vegas, NV 89102

Jeffery A. Bendavid, Esq.
Stephanie J. Smith, Esq.
MORAN BRANDON BENDAVID MORAN
630 S. 4th Street
Las Vegas, NV 89101

Attorneys for Respondent

Date: December 20, 2018

MORRIS ANDERSON

an employee of Morris Anderson